

*[This document was entered by the US District Court for the  
Northern District of California on September 18, 2002]*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

CALIFORNIANS FOR ALTERNATIVES TO	)	
TOXICS, THE ENVIRONMENTAL	)	
PROTECTION INFORMATION CENTER	)	
INC., AND THE HUMBOLDT WATERSHED	)	
COUNCIL,	)	Case No. C00-3150 CW
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY,	)	
CHRISTINE T. WHITMAN	)	
	)	
Defendants.	)	
	)	

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**CONSENT DECREE**

WHEREAS, Californians for Alternatives to Toxics, Environmental Protection Information Center, and Humboldt Watershed Council (collectively "Plaintiffs"), commenced this action for declaratory and injunctive relief ("this Action") on August 31, 2000, against the U.S. Environmental Protection Agency and the Administrator of the U.S. Environmental Protection Agency, then Carol M. Browner, now Christine T. Whitman, (collectively "EPA");

WHEREAS, Plaintiffs amended their complaint against EPA on November 13, 2000, and EPA filed an answer to the amended complaint on December 1, 2000;

WHEREAS, the Parties filed a Second Amended Complaint by stipulation on April 17, 2002;

WHEREAS, Plaintiffs allege that EPA has failed to comply with sections 7(a)(1) and

7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1536(a)(1) and 1536(a)(2), and the Fish and Wildlife Act, 16 U.S.C. §742d-1;

WHEREAS, section 7(a)(1) of the ESA, 16 U.S.C. §1536(a)(1), requires federal agencies, in consultation and with the assistance of the Secretaries of Interior and Commerce, as appropriate, to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of endangered and threatened species listed under section 4 of the ESA;

WHEREAS, section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), requires federal agencies to insure that any action authorized, funded or carried out by such agencies is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat;

WHEREAS, the Fish and Wildlife Act, 16 U.S.C. §742d-1, authorizes and directs the Administrator of the EPA to undertake comprehensive continuing studies on the effects of pesticides upon the fish and wildlife resources of the United States, for the purpose of determining the amounts, percentages, and formulations of such chemicals that are lethal to or injurious to fish and wildlife and the amounts, percentages, mixtures, or formulations that can be used safely, and thereby prevent losses of fish and wildlife from such spraying, dusting, or other treatments;

WHEREAS, Plaintiffs allege, inter alia, the following seven causes of action in their Second Amended Complaint:

(1) a violation of section 7(a)(2) of the ESA for EPA’s failure to consult with the National Marine Fisheries Service (“NMFS”) on the effects of the registration of eighteen named

pesticides<sup>1</sup> on California Coastal Evolutionary Significant Unit (“ESU”) Chinook Salmon, Southern Oregon/Northern California ESU Coho Salmon, Central California Coast ESU Coho Salmon, and their designated critical habitats;

(2) a violation of section 7(a)(2) of the ESA for EPA’s failure to consult with NMFS on the effects of the registration of eighteen named pesticides<sup>2</sup> on Central Valley California ESU Steelhead, Central California Coast ESU Steelhead, South-Central California Coast ESU Steelhead, Southern California ESU Steelhead, and their designated critical habitats;

(3) a violation of section 7(a)(2) of the ESA for EPA’s failure to consult or reinstitute consultation with the U.S. Fish and Wildlife Service (“FWS”) on the effects of the registration of eight named forest operation pesticides<sup>3</sup> on threatened and endangered plants that occur in, near, or adjacent to forests;

(4) a violation of section 7(a)(2) of the ESA by EPA for jeopardizing salmonids and threatened and endangered plants;

(5) a violation of section 7(a)(1) of the ESA for EPA’s failure to affirmatively carry out programs for the conservation of salmonids in consultation with and with the assistance of NMFS;

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<sup>1</sup> The eighteen named pesticides are: acrolein, atrazine, bromacil, carbaryl, chlorpyrifos, diazinon, diuron, glyphosate, hexazinone, imazapyr, molinate, oxyfluorfen, oryzalin, simazine, sulfometuron-methyl, triclopyr butoxyethyl ester, triclopyr triethylammonium, and 2, 4-D-2 ethylhexyl ester.

<sup>2</sup> The eighteen named pesticides are: acrolein, atrazine, bromacil, carbaryl, chlorpyrifos, diazinon, diuron, glyphosate, hexazinone, imazapyr, molinate, oxyfluorfen, oryzalin, simazine, sulfometuron-methyl, triclopyr butoxyethyl ester, triclopyr triethylammonium, and 2, 4-D-2 ethylhexyl ester.

<sup>3</sup> The eight forest operation pesticides are: atrazine, imazapyr, glyphosate, hexazinone, sulfometuron-methyl, triclopyr butoxyethyl ester, triclopyr triethylammonium, and 2,4-D-2 ethylhexyl ester.

(6) a violation of section 7(a)(1) of the ESA for EPA's failure to affirmatively carry out programs for the conservation of threatened and endangered plants in consultation with and with the assistance of FWS; and

(7) a violation of the Fish and Wildlife Act for EPA's failure to undertake comprehensive, continuing studies on the effects of pesticides on salmonids and threatened and endangered plants to determine the amounts, percentages and formulation of the pesticides that are lethal or injurious, and which are safe, for such species;

WHEREAS, Plaintiffs and EPA have agreed to a settlement of this Action, without any admission of fact or law, which they consider to be a just, fair, adequate and equitable resolution of the claims raised in this Action;

WHEREAS, by entering into this Consent Decree, Plaintiffs and EPA do not waive or limit any claim or defense, on any grounds, related to any agency action that may ensue from EPA's performance of its obligations under this Decree;

WHEREAS, it is in the interest of the public, the Parties, and judicial economy to resolve the claims in this lawsuit without protracted litigation;

THEREFORE, the Parties agree as follows:

#### PARTIES

1. The Parties to this Consent Decree are Plaintiffs and EPA.

#### PARTIES BOUND

2. This Consent Decree applies to, is binding upon, and inures to the benefit of Plaintiffs (and their successors, assigns, and designees), and EPA.

#### DEFINITIONS

3. All terms not otherwise defined herein shall have the meaning, if any, assigned to

them, as of the effective date of this Consent Decree or as subsequently modified, by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) and the ESA and the regulations implementing these statutes. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

- a. “Consent Decree” or “Decree” means this Consent Decree.
- b. “Effective Date” means the date, following satisfaction of the public comment provisions set forth in Paragraph 17, upon which this Consent Decree is entered by the U.S. District Court for the Northern District of California.
- c. “Plaintiffs” means Californians for Alternatives to Toxics, Environmental Protection Information Center, and Humboldt Watershed Council.
- d. “EPA” means the U.S. Environmental Protection Agency and Christine T. Whitman, in her official capacity as Administrator of the EPA.
- e. “Services” means the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”).
- f. “Consultation” means consulting with NMFS or FWS pursuant to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2) and 50 C.F.R. Part 402. For the purposes of this Consent Decree only, consultation, whether formal or informal, shall include consideration of the effects of 1) the active and inert ingredients included in all registered pesticide products, which are the subject of a consultation as provided for in Paragraphs 4 through 11 of this Consent Decree, 2) known degradation products of such registered pesticide products, 3) all registered formulation types (e.g., granular, flowable, powder) of such registered pesticide products, and 4) both the highest and typical application rates for such registered pesticide products.

g. “Highest application rates” means the highest rate as defined on pesticide labeling for the registered pesticide uses that are the subject of a consultation as provided for in Paragraphs 4 through 11 of this Consent Decree.

h. “Typical application rates” means the application rate for the registered pesticide uses that are the subject of a consultation as provided for in Paragraphs 4 through 11 of this Consent Decree herein defined by the California Pesticide Use Report, if available, for a pesticide active ingredient in a plant region or specific salmonid ESU involved, or, if no California Pesticide Use Report is available, as determined by EPA.

i. “Forest operation uses” means the following registered pesticide uses that occur in forests: (i) thinning or other control of specific trees, typically of individual trees, to promote growth of desirable species; (ii) thinning or control of vegetation, including grasses and forbs, to reduce fire fuel; (iii) site preparation for replanting of trees; (iv) “conifer release” that covers specific areas rather than individual trees, i.e., post-planting control of vegetation, typically hardwoods, that compete with the conifers; and (iv) control of vegetation on highway, utility, and railroad rights-of-way in and adjacent to forests.

j. “Forest plants” means the federally-listed threatened or endangered plant species identified in Attachment 1 where they occur in California.

k. “Salmonids” means the federally-listed threatened or endangered California Coastal ESU Chinook Salmon, Southern Oregon/Northern California ESU Coho Salmon, Central California Coast ESU Coho Salmon, Central Valley California ESU Steelhead, Central California Coast ESU Steelhead, South-Central California Coast ESU Steelhead, Southern California ESU Steelhead, and their designated critical habitats.

l. “Day” means a calendar day unless expressly stated to be a working day.

In determining any period of time under this Consent Decree, where the last day or the date specified in this Consent Decree falls on a Saturday, Sunday or federal holiday, the period shall run until the close of business on the next working day.

m. “Paragraph” means a portion of this Consent Decree identified by an arabic numeral.

n. “Pesticide uses” means EPA-registered uses of a pesticide, as that term is defined by FIFRA section 2(u), 7 U.S.C. §136(u), which is registered by EPA pursuant to section 3 of FIFRA, 7 U.S.C. §136a, and which is lawfully registered for use, distribution, and sale in California.

#### TERMS OF AGREEMENT

4. With regard to the effects of the forest operation uses of registered pesticide products containing the active ingredients atrazine, imazapyr, glyphosate, hexazinone, sulfometuron-methyl, triclopyr butoxyethyl ester, triclopyr triethylammonium, and 2,4-D-2 ethylhexyl ester on the listed forest plants identified in Attachment 1, EPA agrees to seek the written concurrence of FWS with EPA’s “not likely to adversely affect” determinations, pursuant to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2) and 50 C.F.R. Part 402.13, no later than 120 days after the effective date of this Consent Decree.

5. If FWS issues a non-concurrence for or expressly disagrees with an EPA “not likely to adversely affect” determination made pursuant to Paragraph 4, EPA agrees to request the initiation of formal consultation with FWS, pursuant to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2) and 50 C.F.R. Part 402.14, no later than 120 days after FWS issues a non-concurrence for or expressly disagrees with an EPA “not likely to adversely affect” determination.

6. With regard to the effects of the forest operation uses of registered pesticide products containing the active ingredients imazapyr, sulfometuron-methyl, and triclopyr triethylammonium on listed salmonids and their critical habitat, EPA agrees to seek the written concurrence of NMFS with EPA's "not likely to adversely affect" determinations, pursuant to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2) and 50 C.F.R. Part 402.13, no later than 120 days after the effective date of this Consent Decree.

7. If NMFS issues a non-concurrence for or expressly disagrees with an EPA "not likely to adversely affect" determination made pursuant to Paragraph 6, EPA agrees to request the initiation of formal consultation with NMFS, pursuant to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2) and 50 C.F.R. Part 402.14, no later than 120 days after NMFS issues a non-concurrence for or expressly disagrees with an EPA "not likely to adversely affect" determination.

8. With regard to the effects of the pesticide uses identified in Attachment 2 for registered pesticide products containing the active ingredients acrolein, carbaryl, chlorpyrifos, and diazinon on the specific listed salmonid ESUs identified in Attachment 2 and their designated critical habitat, EPA agrees to request the initiation of formal consultation with NMFS pursuant to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2) and 50 C.F.R. Part 402.14. EPA agrees to request the initiation of such formal consultation no later than 240 days after the effective date of this Consent Decree.

9. With regard to the effects of the pesticide uses identified in Attachment 2 for registered pesticide products containing the active ingredients atrazine, bromacil, diuron, and simazine on the specific listed salmonid ESUs identified in Attachment 2 and their designated critical habitat, EPA agrees to request the initiation of formal consultation with NMFS pursuant



to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2) and 50 C.F.R. Part 402.14. EPA agrees to request the initiation of such formal consultation no later than 420 days after the effective date of this Consent Decree.

10. With regard to the effects of the pesticide uses identified in Attachment 2 for registered pesticide products containing the active ingredients 2,4-D-2 ethylhexyl ester, molinate, oryzalin, and triclopyr butoxyethyl ester on the specific listed salmonid ESUs identified in Attachment 2 and their designated critical habitat, EPA agrees to request the initiation of formal consultation with NMFS pursuant to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2) and 50 C.F.R. Part 402.14. EPA agrees to request the initiation of such formal consultation no later than 600 days after the effective date of this Consent Decree.

11. With regard to the effects of the pesticide uses identified in Attachment 2 for registered pesticide products containing the active ingredients glyphosate, hexazinone, and oxyfluorfen on the specific listed salmonid ESUs identified in Attachment 2 and their designated critical habitat, EPA agrees to request the initiation of formal consultation with NMFS pursuant to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2) and 50 C.F.R. Part 402.14. EPA agrees to request the initiation of such formal consultation no later than 750 days after the effective date of this Consent Decree.

12. EPA will announce through EPA's web site, or other means that are generally accessible to the public, the determinations it makes pursuant to paragraphs 4 through 11. EPA will announce through EPA's web site, or other means that are generally accessible to the public, that it will accept information from the public related to these determinations. The parties agree that the obligation to accept information under this paragraph will not change or modify the subject, scope, or timing of EPA's duties under Paragraph's 4 through 11 inclusive of this decree.

13. Notwithstanding the requirements of Paragraphs 4 through 11, if, prior to the applicable date for requesting the initiation of any consultation covered by this Consent Decree, a registration of a pesticide product or particular use of a pesticide product that is the subject of a consultation covered by this Decree is cancelled or amended to delete such use within the geographic range of a particular species that is the subject of the applicable consultation, EPA shall be relieved of its consultation obligations under this Decree for the particular pesticide product, use and/or species affected by the cancellation or amendment provided that (1) EPA has taken final agency action to delete the use or cancel the registration in question; and (2) such action prohibits the distribution and sale of any and all stocks of pesticide products(s) bearing labeling with the subject use not later than 135 days following the scheduled date for requesting the initiation of consultation as provided for in Paragraphs 4 through 11 of this Decree.

14. Following the issuance of any Biological Opinion resulting from any formal consultation covered by this Decree, EPA agrees to determine whether and in what manner to proceed with the pesticide product registration(s) that is the subject of such Biological Opinion in light of EPA's section 7 obligations and the "reasonable and prudent measures" and/or "reasonable and prudent alternatives" formulated by FWS or NMFS in their Biological Opinion. EPA agrees to take steps, to the extent allowed by law, to begin implementation of such determination no later than 180 days after the issuance of a Biological Opinion by FWS or NMFS. If Plaintiffs wish to challenge EPA's implementation of a Biological Opinion that results from a formal consultation covered by this Decree, Plaintiffs agree to file a 60-day notice and a new complaint as set forth in section 11(g) of the ESA, 16 U.S.C. § 1540(g).

15. As a part of EPA's ongoing ESA section 7(a)(1) proactive conservation review regarding its pesticide programs, EPA agrees to evaluate, with the assistance of both the FWS

and NMFS, how to consider: (1) chronic and sublethal effects of pesticides on all life stages of endangered and threatened species; (2) effects of complete pesticide product formulations, effects of diluents, and adjuvants, and effects of the products of pesticide degradation; (3) how direct and indirect effects of pesticides added to the environmental baseline impact endangered and threatened species; (4) the use of systematic field monitoring in a variety of site conditions, runoff patterns, and application methods to validate transport and persistence models; and (5) best available scientific evidence. Plaintiffs may develop a position paper on items (1) through (5) identified above. EPA agrees to consider such paper in the course of EPA's ongoing ESA section 7(a)(1) proactive conservation review with the Services provided that Plaintiffs submit such paper no later than 90 days after the effective date of this Decree.

16. By December 1, 2002, EPA agrees to publish a Federal Register Notice seeking public comment on the EPA Office of Pesticide Programs' (OPP's) proposal for implementing its long-term endangered species protection program. As part of this proposal, EPA agrees to seek public comment on the best mechanism for obtaining public input on OPP's "affect determinations" made for purposes of compliance with the Endangered Species Act, 16 U.S.C. §1536. EPA will consider these comments in developing its final endangered species protection program.

#### PUBLIC COMMENT

17. Before this Consent Decree became effective, EPA provided a 30-day public comment period on the Decree. Following the 30-day public comment period, EPA determined that a portion of the Decree merited reconsideration. EPA timely provided Plaintiffs with a written request for further negotiations to reconsider this Decree, the basis for such negotiations, and all comments received during the public comment period related to EPA's basis for such

further negotiations and reconsideration. The Parties have conferred and reached agreement on needed changes which are reflected herein.

#### DISMISSAL OF CLAIMS AND TERMINATION OF CONSENT DECREE

18. Upon entry of this Consent Decree by this Court, all causes of action in Plaintiffs' Complaint shall be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1).

19. This Consent Decree shall terminate after EPA has fulfilled all its obligations under Paragraphs 4 through 16 of the Decree. Upon termination of this Consent Decree, EPA shall file the appropriate notice with the Court so that the Clerk of the Court may close the file.

#### CONTINUING JURISDICTION

20. For purposes of entry and enforcement of this Consent Decree only, the Parties agree that the Court has continuing jurisdiction over this matter, the Parties to the Consent Decree, any disputes arising under this Consent Decree, and any alleged violations of this Consent Decree, and may issue such further orders or direction as may be necessary or appropriate to construe, implement, modify or enforce the terms of this Consent Decree, and for granting any further relief as the interests of justice may require.

#### REMEDY AND SCOPE OF JUDICIAL REVIEW

21. Nothing in the terms of this Consent Decree shall be construed to confer upon this Court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Consent Decree, except for the purpose of determining EPA's compliance with this Consent Decree.

22. Plaintiffs' entry into this Consent Decree does not imply in any way their acquiescence to the manner in which EPA performs its formal or informal consultations.

Plaintiffs reserve any rights they may have to challenge any and all EPA formal or informal consultations with the Services by filing suit to challenge either the issuance of a Biological Opinion by NMFS or FWS, or the issuance of a written concurrence by NMFS or FWS with EPA's "not likely to adversely affect" determination.

23. Plaintiffs' sole judicial remedy to address the merits of any final action that may ensue from EPA's performance of its obligations under this Consent Decree is to file a separate lawsuit challenging such final action. EPA reserves all of its defenses to any such suit. Nothing in this Consent Decree alters or affects the standards for judicial review of final EPA action, or creates jurisdiction that would otherwise not exist to review EPA action.

#### AGENCY DISCRETION

24. Except as expressly provided herein, nothing in this Consent Decree shall be construed to limit or modify the discretion accorded EPA by the ESA, the Fish and Wildlife Act, FIFRA, or general principles of administrative law.

25. Nothing in this Consent Decree shall bar EPA from acting on any matters covered in this Consent Decree in a time frame earlier than required by this Consent Decree or to take additional actions not specified herein if EPA determines such actions are appropriate under applicable law.

#### COMPLIANCE WITH OTHER LAWS

26. Nothing in this Consent Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take any action in contravention of the ESA, the Fish and Wildlife Act, FIFRA, the Administrative Procedure Act ("APA"), or any other law or regulation, either substantive or procedural. Plaintiffs reserve any rights they may have to challenge EPA's

construction of applicable laws, including the Anti-Deficiency Act.

#### MODIFICATION

27. This Consent Decree may be modified by written agreement of the Parties.

Nothing in this Consent Decree, or in the Parties' agreement to its terms, shall be construed to limit any equitable power the Court may have to modify the terms of the Consent Decree upon a showing of good cause by any Party. Good cause may include, but is not limited to, changes in the law. The Parties reserve any rights they may have to challenge any request for modification of this Decree.

#### FORCE MAJEURE

28. The Parties recognize that performance under this Consent Decree is subject to fiscal and procurement laws and regulations of the United States which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C. § 1341, et seq. A force majeure event may arise, due to circumstances outside the reasonable control of EPA, that could delay compliance with the obligations set forth in this Consent Decree. Such force majeure events include, but are not limited to, a government shutdown, such as occurred in 1995 and 1996, a failure of Congress to renew maintenance fees under 7 U.S.C. § 136a-1(i) without the provision of comparable replacement funding, or catastrophic environmental events requiring immediate and/or time-consuming response by EPA. Should a delay occur due to a force majeure event, any resulting failure to fulfill any obligations set forth herein shall not constitute a failure to comply with the terms of this Consent Decree, and any deadlines so affected shall be extended one day for each day of the delay. As soon as possible under such circumstances, EPA will provide Plaintiffs with notice invoking the relief provided for under this Paragraph, and with an explanation of EPA's basis for invoking this relief. EPA shall also provide Plaintiffs with reasonable notice of the

termination of the force majeure event upon which EPA invoked this relief. Any dispute regarding invocation of such relief shall be resolved in accordance with the dispute resolution provision paragraph of this Consent Decree.

#### DISPUTE RESOLUTION

29. In the event of a disagreement between the Parties concerning the interpretation or performance of any aspect of this Consent Decree, the dissatisfied Party shall provide the other Party with written notice of the dispute and a request for negotiations. The Parties shall meet and confer in order to attempt to resolve the dispute within 20 days after receipt of the notice, or such time thereafter as is mutually agreed upon. If the Parties are unable to resolve the dispute within 30 days after receipt of the notice, or such time thereafter as is mutually agreed upon, then either Party may petition the Court to resolve the dispute.

#### RELEASE BY PLAINTIFFS

30. This Consent Decree constitutes a complete and final settlement and is in full satisfaction of all claims asserted by Plaintiffs against EPA in this Action. Upon the effective date of this Consent Decree, Plaintiffs release and discharge EPA from all causes of action asserted by Plaintiffs against EPA in this Action. Plaintiffs hereby agree not to bring, join EPA in, or provide financial assistance or volunteer technical information to anyone bringing or joining EPA in any court proceeding which concerns the causes of action asserted by Plaintiffs against EPA in this Action. Plaintiffs further agree not to bring, join EPA in, or provide financial assistance or volunteer technical information to anyone bringing or joining EPA in any court proceeding which concerns a violation of section 7(a)(2) of the ESA for EPA's failure to consult with NMFS on the effects of pesticide registrations on Central Valley California ESU Steelhead, Central California Coast ESU Steelhead, South-Central California Coast ESU

Steelhead, Southern California ESU Steelhead, and their designated critical habitats until after the completion of the consultations as provided for in Paragraphs 6 through 11 of this Consent Decree. Plaintiffs also agree not to bring, join EPA in, or provide financial assistance or volunteer technical information to anyone bringing or joining EPA in any court proceeding which concerns a violation of section 7(a)(2) of the ESA for EPA's failure to consult with NMFS on the effects of pesticide registrations on California Coastal ESU Chinook Salmon, Southern Oregon/Northern California ESU Coho Salmon, Central California Coast ESU Coho Salmon, and their designated critical habitats until after EPA has requested the initiation of consultation with NMFS pursuant to Paragraph 11 of this Decree (i.e., no later than 750 days after the effective date of this Consent Decree). Notwithstanding the foregoing, nothing in this Paragraph shall limit Plaintiffs' right to provide information concerning the pesticides or species that are the subject of any consultation covered by this Consent Decree to any other entity, unless it can reasonably be anticipated that such information is intended to be used by that entity in any court proceeding which concerns the causes of action asserted by Plaintiffs against EPA in this Action.

31. Plaintiffs do not waive any right they may have to bring suit against EPA in the future for any violations of law which may arise, including but not limited to violations of Section 7 of the ESA for the forest plants or salmonids based upon future reregistration or registration amendment of existing pesticide products, or registration of a new pesticide product or of a new use or additional use of an existing pesticide product.

32. During the consultation periods ensuing from this Consent Decree, Plaintiffs agree not to seek to enjoin under the ESA, or provide financial assistance or volunteer technical information to anyone seeking to enjoin under the ESA, the pesticide uses at issue in any consultation covered by this Decree. Notwithstanding the foregoing sentence, nothing in this



Paragraph shall limit Plaintiffs' right to provide information concerning the pesticides or species that are the subject of any consultation covered by this Consent Decree to any other entity unless it can reasonably be anticipated that such information is intended to be used by that entity, during the consultation periods ensuing from this Decree, in seeking to enjoin under the ESA the pesticide uses at issue in any consultation covered by this Decree.

#### ATTORNEYS' FEES AND COSTS

33. The Parties agree that EPA shall pay \$56,500.00 to Plaintiffs for attorneys' fees and costs as a full and complete settlement of Plaintiffs' claim for attorneys fees and costs to date in this action. EPA shall pay the above amount within 60 days of the effective date of this Consent Decree and/or shall, within 15 days of the effective date of this Decree, submit the required information to the United States Department of the Treasury for payment to be made to Brian Gaffney Attorney Client Trust Account in the above amount.

#### APPLICABLE LAW

34. This Consent Decree shall be governed by and construed under the laws of the United States.

#### ENTIRE AGREEMENT

35. This Consent Decree constitutes the entire agreement of the Parties in this case. All prior conversations, meetings, discussions, drafts and writings of any kind are specifically superseded by this Consent Decree.

#### MUTUAL DRAFTING

36. The Parties to this Consent Decree agree that this Decree was jointly drafted by them. Accordingly, the Parties agree that any and all rules of construction to the effect that ambiguity is constructed against the drafting Party shall be inapplicable in any dispute

concerning the terms, meaning, or interpretation of this Consent Decree.

#### USE OF CONSENT DECREE

37. This Consent Decree shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, including, without limitation, EPA, its officers, or any other person affiliated with it, or an interpretation of any applicable provision of law.

#### THIRD-PARTY BENEFICIARIES

38. Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Consent Decree. The Parties consent to the form, substance and entry of this Consent Decree.

#### EFFECTIVE DATE

39. The terms of this Decree shall become effective upon entry of an order by the U.S. District Court for the Northern District of California ratifying this Decree. This Consent Decree shall not be entered with the Court and thereby become effective until the public comment provisions of Paragraph 17 have been satisfied.

#### NOTICE AND CORRESPONDENCE

40. Any notice, including correspondence, required with respect to this Consent Decree, shall be in writing, effective upon receipt, and sent to the following persons, or to such other person or persons as any Party may subsequently identify (in accordance with this provision) to the other Parties:

For Plaintiffs:

By U.S. Mail or Courier:  
Patricia Clary  
Californians for Alternatives to Toxics  
PO Box 1195

Arcata, CA 95518

and

By U.S. Mail or Courier:  
Brian Gaffney  
LAW OFFICES OF BRIAN GAFFNEY  
370 Grand Ave #5  
Oakland, CA 94610

For EPA:

By U.S. Mail:  
Arthur Jean B. Williams, Chief  
Environmental Field Branch (7506C)  
Office of Pesticide Programs  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

By Courier:  
Arthur Jean B. Williams, Chief  
Environmental Field Branch, 11<sup>th</sup> Floor  
Office of Pesticide Programs  
U.S. Environmental Protection Agency  
1921 Jefferson Davis Highway  
Arlington, VA 22202  
Phone: (703) 305-5239

and

By U.S. Mail or Courier:  
Mark Dyner  
Office of General Counsel  
Pesticides and Toxics Substances Law Office (2333A)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

#### COUNTERPARTS

41. This Consent Decree may be executed in any number of counterparts, each of

which shall be deemed to constitute an original, and all of which, taken together, shall constitute one and the same instrument. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

#### SEVERABILITY

42. If any term, condition or provision of this Decree, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction or rendered by the adoption of a statute by the United States invalid, void or unenforceable, the remainder of the terms, covenants, conditions or provisions of this Decree, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

#### REPRESENTATIVE AUTHORITY

43. Each undersigned representative of the Parties to this Consent Decree certifies that he or she is fully authorized to enter into and execute the terms and conditions of this Consent Decree, and to legally bind such Party to this Consent Decree. By the signatures below, the Parties consent to entry of this Consent Decree after the public comment provisions of Paragraph 17 of this Decree have been satisfied.

FOR PLAINTIFFS:

Dated: \_\_\_\_\_

\_\_\_\_\_  
Brian Gaffney  
LAW OFFICES OF BRIAN GAFFNEY  
370 Grand Ave #5  
Oakland, CA 94610

Counsel for Plaintiffs  
Californians for Alternatives to Toxics  
Environmental Protection Information Center  
Humboldt Watershed Council

FOR EPA:

Dated: \_\_\_\_\_

\_\_\_\_\_  
Robert E. Fabricant  
General Counsel  
U.S. Environmental Protection Agency

THOMAS L. SANSONETTI  
Assistant Attorney General  
Environmental and Natural Resources Division  
U.S. Department of Justice

Dated: \_\_\_\_\_

By: \_\_\_\_\_

Wayne Hettenbach, Trial Attorney  
Wildlife and Marine Resources Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Benjamin Franklin Station, P.O. Box 7369  
601 D Street, NW, Rm. 3914  
Washington DC 20044

OF COUNSEL:

Mark Dyner  
Office of General Counsel  
U.S. Environmental Protection Agency

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

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CLAUDIA WILKEN  
UNITED STATES DISTRICT JUDGE

## ATTACHMENT 1

### Forest plants:

Chorizanthe pungens hartwegiana	Ben Lomond Spineflower
Cordylanthus tenuis capillaris	Pennell's Bird Beak
Cupressus abramsiana	Santa Cruz cypress
Erysimum teretifolium	Ben Lomond wallflower (Santa Cruz wallflower)
Galium californicum	El Dorado bedstraw
Lesquerella kingii	San Bernardino Mountains bladderpod
Lilium occidentale	Western lily
Piperia yadonii	Yadon's piperia (Yadon's rein orchid)
Potentilla hickmani	Hickman's potentilla (Hickman's cinquefoil)
Taraxacum californicum	Monterey clover
Tuctoria greenei	Greene's tuctoria
Arctostaphylus pallida	Pallid manzanita
Calyptridium pulchellum	Mariposa pussypaws
Castilleja cinerea	Ash gray Indian paintbrush
Cupressus goveniana goveniana	Gowen's cypress
Eriogonum kennedyi austromontanum	Southern mountain wild buckwheat
Arabis macdonaldiana	MacDonald's rock-cress
Poa atropurpurea	San Bernardino bluegrass
Baccharis vanessae	Encinitas baccharis
Brodiaea filifolia	Thread-leaved brodiaea
Dudleya cymosa	Marescent & Santa Monica Mountains dudleya [2 subsp]
Eriastrum hooveri	Hoover's woolly-threads (Hoover's eriastrum)
Orcuttia tenuis	Slender orcutt grass
Senecio laynei	Layne's butterweed (Layne's ragwort)
Rorippa gambellii	Gambel's watercress
Sidalcea keckii	Keck's checkermallow (Keck's checkerbloom)
Thlaspi californicum	Kneeland Prairie Pennycress
Chlorogalum pupureum reductum	Purple amole
Clarkia springvillensis	Springville clarkia
Eriodictyon capitatum	Yreka phlox
Howellia aquatilis	Water howellia

## ATTACHMENT 2

<u>Active Ingredient</u>	<u>Pesticide Uses</u>	<u>Salmonid ESUs</u>
Acrolein	irrigation systems Salmon;	So. Oregon/No. California Coho
		Central California Coast Steelhead
		Central Valley Steelhead
	apple	Central California Coast Coho Salmon;
		South-Central California Coast
Steelhead		
Steelhead;	lawn & garden	California Coastal Chinook Salmon;
		South-Central California Coast
	strawberry	Southern California Steelhead
		South-Central California Coast Steelhead
Chlorpyrifos	tomato	Central Valley California Steelhead
	structural pest control	Central California Coast Coho Salmon;
		California Coastal Chinook Salmon;
	landscape maintenance	Central California Coast Steelhead;
		Central Valley California Steelhead
	lawn & garden	Central California Coast Coho Salmon;
		California Coastal Chinook Salmon;
Steelhead	apple	Southern California Steelhead
		Central California Coast Coho Salmon;
	tomato	Central California Coast Steelhead;
		South-Central California Coast
	broccoli	Central California Coast Steelhead
		South-Central California Coast



		Steelhead; Southern California Steelhead
	citrus (including lemon)	Southern California Steelhead
	walnut	Central Valley California Steelhead
	almond	Central Valley California Steelhead
Diazinon	lawn & garden	Central California Coast Coho Salmon; California Coastal Chinook Salmon; South-Central California Coast Steelhead; Southern California Steelhead
	structural pest control	California Coastal Chinook Salmon; Central Valley California Steelhead
	landscape maintenance	California Coastal Chinook Salmon; Central California Coast Steelhead
	lettuce leaf & head	Central California Coast Coho Salmon; South-Central California Coast Steelhead;
	almond	Central Valley Steelhead
	plum	Central Valley California Steelhead
Atrazine	forest trees	So. Oregon/No. California Coho Salmon
	sudan grass	Central Valley California Steelhead
Bromacil	rights-of-way	Central Valley California Steelhead
Diuron	nursery-outdoor/transplant	So. Oregon/No. California Coho Salmon
	landscape maintenance	California Coastal Chinook Salmon;

		Central California Coast Steelhead
	lawn & garden	Southern California Steelhead
Salmon;	rights-of-way	Central California Coast Coho
		California Coastal Chinook Salmon; Central California Coast Steelhead; South-Central California Coast
Steelhead;		Southern California Steelhead; Central Valley California Steelhead
	wine grape	California Coastal Chinook Salmon; South-Central California Coast
Steelhead		
	alfalfa	Central Valley California Steelhead
Simazine	wine grape	Central California Coast Coho Salmon; California Coastal Chinook Salmon; Central California Coast Steelhead; South-Central California Coast
Steelhead;		
	lemon	Southern California Steelhead
	almond	Central Valley California Steelhead
2, 4-D-2 Ethylhexyl Ester	forest trees	So. Oregon/No. California Coho Salmon; California Coastal Chinook Salmon
Molinate	rice	Central Valley California Steelhead
Oryzalin	wine grape	Central California Coast Coho Salmon; California Coastal Chinook Salmon; Central California Coast Steelhead; South-Central California Coast
Steelhead		

	almond	Central Valley California Steelhead
Triclopyr Butoxyethyl Ester	forest trees	So. Oregon/No. California Coho Salmon; California Coastal Chinook Salmon; Central California Coast Steelhead
Glyphosate	forest trees	So. Oregon/No. California Coho Salmon;
	landscape maintenance	California Coastal Chinook Salmon
	lawn & garden	California Coastal Chinook Salmon
	rights-of-way	So. Oregon/No. California Coho Salmon; Central California Coast Coho
Salmon;		Central California Coast Steelhead; South-Central California Coast
Steelhead;		Southern California Steelhead; Central Valley California Steelhead
	wine grape	Central California Coast Coho Salmon; California Coastal Chinook Salmon; Central California Coast Steelhead; South-Central California Coast
Steelhead;		Southern California Steelhead
	citrus (including lemon)	Southern California Steelhead
	almond	Central Valley California Steelhead
Hexazinone	alfalfa	So. Oregon/No. California Coho Salmon; Central California Coast Steelhead; South-Central California Coast
Steelhead;		

		Central Valley California Steelhead
Salmon	forest trees	Central Valley California Steelhead; So. Oregon/No. California Coho
Oxyfluorfen	wine grape	Central California Coast Coho Salmon; Central California Coast Steelhead; South-Central California Coast
Steelhead;		Southern California Steelhead
	almond	Central Valley California Steelhead
	walnut	Central Valley California Steelhead